

STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
KAREN M. FORT HOOD, P.J., KIRSTEN FRANK KELLY and PAT M. DONOFRIO, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-VS-

Supreme Court
No. 146523

SCHUYLER DION CHENAULT,

Defendant-Appellant.

Court of Appeals No. 309384

Circuit Court No. 2008-222726 FC

BRIEF ON APPEAL -- APPELLEE

ORAL ARGUMENT REQUESTED

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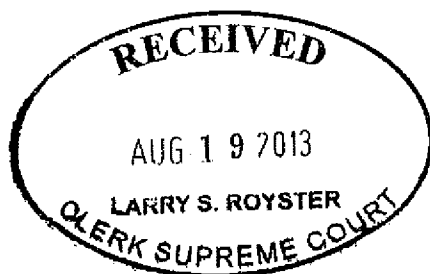


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JURISDICTIONAL STATEMENT

Defendant filed an application in this Court for leave to appeal the November 27, 2012, per curiam opinion of the Court of Appeals (3a-21a) under MCR 7.301; MCR 7.302. In an order dated June 5, 2013, this Court granted the application and instructed the parties to address the following issues:

(1) whether the Court of Appeals' decision in *People v Lester*, 232 Mich App 262, 281 (1998), correctly articulates what a defendant must show to establish a *Brady* violation; (2) whether the Court of Appeals erred when it reversed the trial court's grant of a new trial, which was premised on the prosecution's violation of the rule from *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); and (3) whether trial counsel rendered ineffective assistance of counsel under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for failing to exercise reasonable diligence after learning of the existence of the videotaped interviews.

This Court has jurisdiction under MCR 7.301(A)(2) and MCR 7.302(H)(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS' DECISION IN *PEOPLE V LESTER*, CORRECTLY ARTICULATES WHAT A DEFENDANT MUST SHOW TO ESTABLISH A *BRADY* VIOLATION?

Defendant contends the answer is, "No."

The People contend the answer is, "Yes."

The circuit court did not answer this question.

The Court of Appeals answered: "Yes."

II. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT ORDER GRANTING DEFENDANT A NEW TRIAL AFTER FINDING THAT THE RECORDED WITNESS INTERVIEWS WERE EITHER NOT FAVORABLE TO DEFENDANT AND/OR THEIR SUPPRESSION DID NOT UNDERMINE THE CONFIDENCE IN THE OUTCOME OF THE TRIAL?

Defendant contends the answer is, "Yes."

The People contend the answer is, "No."

The circuit court did not answer this question.

The Court of Appeals reversed the trial court order granting defendant a new trial.

III. WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO EXERCISE REASONABLE DILIGENCE AFTER LEARNING OF THE EXISTENCE OF THE VIDEOTAPED INTERVIEWS?

Defendant contends the answer is, "Yes."

The People contend the answer is, "No."

The circuit court did not answer this question.

The Court of Appeals did not answer this question.

COUNTER-STATEMENT OF FACTS

Following a jury trial before Oakland County Circuit Court Judge Daniel P. O'Brien, defendant was convicted of open murder, MCL 750.316 [under theories of first degree felony murder and first degree premeditated murder] and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison without parole on the murder conviction and two years in prison on the felony firearm conviction.

Defendant was convicted of killing Kevin Harris [aka Kutta]. The parties stipulated that defendant was physically present at the scene when Harris was fatally shot in Pontiac, Michigan (1b). During defense counsel's opening statement, he asserted that Harris was shot by Jared Chambers (2b).

Pontiac Police Officer Edward Lasseigne testified that on June 29, 2008, he was dispatched to the POH [Pontiac Osteopathic Hospital] (4b-5b). At the hospital, Lasseigne saw Heather Holloway, who was covered in blood and was very shaky (11b). Holloway told Lasseigne that she was sitting in the car with Harris when two gentlemen walked up to the vehicle from behind (12b). One of the individuals pointed a gun at Harris' head and told Harris to give him his money, or something to that effect (13b). That person fired at Harris, and Holloway got out of the car and ran across the field while several shots were fired at her as someone was yelling, "Run bitch" (13b). Holloway said she did not know the shooter, but she would recognize him if she saw him (13b).

Jared Chambers testified he was 23 years old and did not have any felony convictions or convictions involving crimes of dishonesty (15b-16b). Chambers said he knew Harris for about three years and was friendly with him (16b-17b). Chambers knew that Harris sold cocaine and marijuana (18b). Harris told Chambers to call him if he knew anybody that needed drugs (19b).

Harris always gave Chambers a finder's fee if he found someone that Harris could sell drugs to (19b). Harris always delivered the drugs (20b). Chambers said he knew Holloway, and had met her five to ten times prior to the shooting (21b). Chambers had Holloway's cell phone number because he used it on occasion to reach Harris (21b). Chambers never saw Harris be aggressive or pull a gun on anyone (23b-24b).

Chambers said he met defendant through Larry Crockett (25b). Chambers was friends with Keith Blevins, and Blevins was friends with Crockett. Defendant told Chambers he sold cocaine, and Chambers told him he knew people and could get defendant some business (26b-27b). Chambers told defendant he had a hook-up for buying drugs if defendant wanted to buy some (28b). Chambers said he did not tell defendant the name of the person he was talking about, but Chambers was talking about Harris (28b). Chambers never gave defendant Harris' phone number (28b).

On June 29, 2008, defendant called Chambers and asked if Chambers could get him some cocaine (30b). Chambers told defendant he would get back to him (30b). After speaking with Harris, Chambers quoted defendant a price of \$1000 for an ounce and a half of cocaine, which included a \$100 finder's fee (34b). Defendant agreed with the price and met Chambers at Blevins' trailer in White Lake, Michigan (34b). Later that night, Blevins and Chambers were supposed to meet up with some girls they knew at the White Castle in Pontiac, Michigan (36b). After the drug transaction, Chambers planned on having defendant drop him and Blevins off at the White Castle, but Chambers had not told defendant (37b-38b). Defendant arrived at Blevins' in a four-door red Saturn, and two other people were with defendant [Joshua Koch and Erica Upshaw] that Chambers had never met before (39b-40b). Shortly thereafter, all five of them

[Koch, Upshaw, Blevins, Chambers and defendant] left in the Saturn to go to Pontiac to get the cocaine (41b).

Once Koch, Upshaw, Blevins, Chambers and defendant arrived in Pontiac, Chambers called Harris and Harris gave him directions (44b-45b). Shortly after stopping the car, Harris pulled up in a car behind them (45b). Chambers got out of the car alone and entered Harris' car (45b). Chambers asked Harris if it was okay for defendant to get into Harris' car, and Harris had no objection, so Chambers went to get defendant (47b). Defendant then entered Harris' car in the passenger back seat (48b). Harris had a bag of cocaine and set it on the center console to show defendant (48b-49b). Defendant tasted the cocaine and said it was "pretty good," but he wanted "chunks" as opposed to "powder" (49b). Harris told defendant he could hook him up and it would take 15-20 minutes (50b). Chambers and defendant exited Harris' vehicle and went back to their vehicle, and Harris left the scene (50b-51b). A short time later, Chambers received a phone call from Harris, and Koch drove to another location. Harris and his passenger [Holloway] drove up behind Koch (52b-53b). Defendant and Chambers got out of the Saturn, and Chambers got in the back passenger seat of Harris' car (54b). Chambers saw defendant walk by his door and behind Harris' car and go up to Harris' door and say, "Give me your shit" or something to that effect, and then he shot Harris in the head without hesitation (55b-56b). Prior to that moment, Chambers did not know defendant had a gun (55b-56b). Chambers got out of the car and ran (57b).

After getting away from the scene, Chambers called his mom and she came and picked him up (58b). Later that night, Blevins called Chambers and told him what happened inside the Saturn (59b). Chambers said he spoke to Pontiac police officers the next day (60b). Chambers told the police who shot Harris, but he did not know defendant's last name (61b). The police put

together a photographic lineup, and Chambers picked defendant out of the lineup (63b). Chambers denied killing Harris and denied trying to rip him off and blame defendant (64b). Chambers said he did not voluntarily go to the police station; a detective came to his residence and picked him up (65b-66b).

Keith McBee-Blevins, Jr. [Blevins] testified he was 22 years old and worked as a roofer (70b). Blevins said he had been friends with Chambers since they were in the tenth grade (70b-71b). Blevins knew that Chambers occasionally would find drug buyers for Harris (73b). On the date of the offense, Blevins and Chambers were supposed to meet a couple of girls Blevins knew at a White Castle in Pontiac and then go to the fireworks (74b-75b). The afternoon of the shooting, Blevins was hanging out with Chambers at Blevins' trailer, and he was present when Chambers talked to defendant on the phone (76b). Defendant arrived at Blevins' trailer in a Saturn, and a girl and guy Blevins did not know were in the front seat (79b-80b). All three went inside Blevins' trailer because defendant had to use the restroom (80b). Blevins said he went along for the ride because neither he nor Chambers had a car and they needed to be dropped off at the White Castle (82b). While in the car with Chambers, Blevins never saw defendant give money to Chambers, and he never saw Chambers, defendant or the driver with a gun prior to the shooting (108a-109a).

While Blevins was in Pontiac waiting for the drug exchange, he heard a gunshot shortly after Chambers and defendant exited the Saturn (110a). Blevins turned around and saw defendant standing next to the driver's side of the car where Harris was located (110a). After hearing the shot Blevins yelled at Koch, "Get out of here," but Koch turned around with a gun, pointed it at him, and said, "Get the f—out of the car" (110a-111a). Blevins said he got out of the car and ran (Tr II, 188). Blevins heard Holloway say, "They shot my baby" (111a). Blevins thought he heard

another gunshot (111a). Blevins said he eventually called the girls he was supposed to meet at the White Castle to come pick him up (111a-112a). Blevins did not know Holloway before the night in question (112a). Blevins did not call 911 because he did not know what had happened (113a). The next morning, the Pontiac police contacted Blevins and he went to the police station and gave a statement and viewed a photographic lineup (113a). Blevins identified defendant in the photographic lineup (113a-114a). Chambers never told him he was upset with Harris or wanted to rip him off (114a). Blevins admitted he did not see who actually fired the shots (122a).

Heather Holloway testified she was 23 years old, she first met Harris through her brother when she was 18, and they had a son together (85b-87b). Harris performed rap music at Pontiac clubs (89b). Harris was also making money by selling drugs (90b). Holloway said Harris was friends with Chambers, but she did not hang out with Chambers before or after the shooting (92b). As far as Holloway knew, Chambers had never been to her house or around her children (92b).

On the date of the shooting, Harris received a phone call from Chambers asking for cocaine (94b). Holloway knew Harris was asking \$900 for 1 ½ ounces of cocaine (94b). At some point Harris left the house in Holloway's cousin's Grand Am after receiving a phone call, but he returned approximately ten minutes later (98b). Harris returned because "they" did not want shake [powder cocaine], but wanted it in a chunk (99b). After processing the powder into a chunk, Harris asked Holloway to go with him, and she did (100b-101b). Harris parked behind the car with the individuals that were buying the cocaine (123a-125a). Two guys got out of the back seat of the other car, and Holloway recognized one of them as being Chambers (125a). Chambers got into the back passenger seat of Harris' car, and closed the door (125a). The other guy that Holloway identified as defendant opened the driver's side back door (126a). Defendant said to

Harris, "Give me everything," and then he shot Harris (127a). Holloway got out of the car and defendant yelled, "go bitch" and defendant shot again (127a). Holloway said she saw someone in front of her running, and she thought it was Chambers because he got out of the car before she did (127a, 106b-108b). Holloway looked back and saw the other car had pulled out, so she ran back to Harris (127a).

Holloway called Santos [Delvalle] and they took Harris to the hospital (128a). After the shooting, Holloway did not see the drugs that Harris had brought with him (129a). Santos gave hospital personnel a fake first name for Harris because he had a warrant out for his arrest (130a). Holloway identified defendant in a photographic lineup (131a). Holloway initially told the police she and Harris were sitting in the park talking when two guys came up and robbed them and shot Harris (97b). Holloway did not initially tell the police about the drug deal (97b). Holloway said she was protecting Harris because he had a warrant out for his arrest, and she did not want to tell the police he was selling drugs when he got shot (98b). After Harris died, Holloway told the police what actually happened (98b-99b). In Holloway's second statement to the police on July 2, 2008, she did not mention Chambers in her handwritten statement, but she did mention him in her oral statement (104b, 110b). Holloway did say in her written statement that two individuals left the other car, and one of them went to Harris' back passenger seat and the other went to the driver's side and did the shooting (109b).

Harris died around 1:00 p.m. on June 30, 2008 (105b). The police came to Holloway's mother's house after Harris died, but Holloway did not talk to them (105b). Holloway said she had no reason to cover up for Chambers or blame someone for the murder that did not commit it (109b).

Amy Chambers [hereinafter "Ms. Chambers"] testified she was Jared Chamber's mother. On the date of the offense, she received a phone call from her son around 10 p.m. Chambers was frantic, and was on Dixie Highway in Pontiac, and he asked his mother to pick him up (111b). Ms. Chambers eventually found her son hiding behind a building, and he got into the car and ducked down in the back seat (112b). Ms. Chambers did not see a gun or drugs on her son (112b). Chambers eventually told his mother what had happened, and his mother told him he should go to the police (113b). Chambers never told his mother that he shot Harris (114b). Ms. Chambers did not know her son sold drugs (115b). Ms. Chambers thought her son eventually called the police (117b). Ms. Chambers said she did not call the police because her son did not want her to (117b). Chambers did not have a working car on the date in question (118b).

Pontiac Police Officer Steven Wittebort testified he was called to the POH on the date in question (119b-120b). Upon arriving at the hospital, Wittebort saw approximately 100 people gathered outside the ER entrance (120b). Wittebort knew that two individuals had been taken down to the station, Holloway and Melvin Wooten (122b). Holloway told Wittebort that she and Harris were parked when two males approached them and shot Harris (134a). Chambers initially only knew defendant's first name (135a). Wittebort interviewed Chambers, and Chambers made some phone calls at Wittebort's request in an attempt to discover defendant's last name (135a).

Wittebort testified that he put together a photographic lineup, and Chambers and Holloway immediately identified defendant as the shooter (135a-136a). Blevins identified defendant as being present that night (136a). Holloway eventually came forward with the full story and wrote a statement (136a). Wittebort said he initiated the call to Chambers (138a, 124b). Wittebort never talked to Koch or Upshaw (125b).

Wittebort said Holloway told him she initially lied because she was scared (123b). In Holloway's second statement, she mentioned Chambers, but his name was not mentioned in her written statement (137a). Wittebort said all the interviews were recorded, and defense counsel should have had all the recorded interviews (137a). Defense counsel indicated he never had the recorded interviews (137a).

Defendant testified and admitted he used marijuana and cocaine, and started using cocaine shortly after high school (126b-127b). Defendant contacted Chambers midafternoon on June 29, 2008 to get some cocaine, and he had the \$1000 for the cocaine from his job and from his parents (128b-130b). Chambers told defendant he could get him the cocaine (130b).

Upshaw and Koch picked up defendant and took him to a trailer in White Lake to meet Chambers (131b). After defendant arrived at the location, Chambers told him they had to drive to Pontiac because "his boy" had the cocaine (132b). Defendant said that when they arrived in Pontiac, they met Chamber's friend, Harris (134b). Defendant said that during the course of his travels to Pontiac, he gave the \$1000 to Chambers (135b). Harris showed defendant the drugs and defendant tested the cocaine by tasting it (136b). Defendant said Harris had the cocaine and a black revolver on his lap (136b). Defendant asked Harris if he could get the cocaine in chunk form instead of powder, and Harris said he could and left to make the exchange (137b).

When Harris returned, defendant said Chambers asked him to get out of the car and look to see if anybody was coming (138b). Defendant said he heard a gunshot and took off running (138b). Defendant did not see who shot the gun (139b). After the shooting, Chambers also took off running (139b). Defendant said he did not shoot anybody and did not have a grudge against Harris, and Chambers still had the \$1000 (140b-141b). Eventually defendant got back to the car and Koch drove him to his house (141b). Defendant did not call the police and tell them about

the shooting, because he did not want to be known as a snitch (141b). Defendant admitted he gave Chambers the money for the cocaine without first seeing the cocaine (143b). After the gunshot, Koch [who defendant was “tight” with] did not get out of the car to see if someone was shooting at defendant (144b). Defendant said Blevins got out of the car and took off running (144b).

Following the verdict and sentencing, defendant filed a motion for new trial, raising several issues, including the issue that the prosecution failed to turn over *Brady*¹ materials. The trial prosecutor asserted he never had recorded witness interviews in his possession (146a). The prosecutor recognized that defense counsel found out during trial that the recordings existed, but did nothing about it until after the conviction (145a). The trial court denied the motion for new trial on the record on November 30, 2011, but entered an order for an evidentiary hearing to address defendant’s only remaining issue -- whether recorded witness statements existed, and if so, did their nondisclosure violate *Brady*.

Prior to the evidentiary hearing, the prosecution filed three affidavits from the prosecutors involved in the case attesting to the fact that they did not know about or have in their possession recorded witness statements prior to trial (160a-161a, 145b). Defendant’s former attorney Anthony Chambers also filed an affidavit attesting to the fact that he never had possession of recorded witness interviews (159a).

At the evidentiary hearing, defendant’s aunt Audrey Rice was called as a witness by the defense and testified that she attended the trial of her nephew (146b). Rice was in the courtroom on the last day of trial when Detective Wittebort testified (146b). Rice said she saw Wittebort offer some recordings to defense counsel, Alvin Keel (146b). Rice said she heard Wittebort say

¹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

to Keel that he had the recordings, and then he left the courtroom (147b). Wittebort returned approximately ten minutes later with the DVD and slid it on the table toward Keel (147b). Wittebort told Keel that the DVD was the master copy and he could get Keel a copy within the week (147b). Rice said she confronted Keel outside the courtroom after the exchange because he did not take the DVD. Rice said she was furious with Keel because "I couldn't understand why Mr. Keel didn't take the tape and I confronted him outside the courtroom because I was furious like -- how dare you not take the tape after we've been looking for it, the other attorneys have not been able to locate it" (148b). Rice assumed that the DVD was the recording of the witness' statement (148b). Rice said the exchange between Keel and Wittebort occurred after her nephew testified and after the jury was excused to deliberate (149b-150b).

Twelve stipulated joint exhibits were offered and admitted into evidence for purposes of the evidentiary hearing and appellate review (151b-152b).² Detective Wittebort testified at the evidentiary hearing that he was the officer in charge of the case (162a). The Pontiac Police Department was taken over by the Oakland County Sheriff's Department, so Wittebort currently worked for the Oakland County Sheriff's Department (178a). Wittebort said he had the recorded witness interviews from the beginning of the investigation, but they were not provided to the warrant prosecutor for her review (164a). Wittebort said he usually did not give the recordings to the warrant prosecutor, unless the prosecutor wanted the recordings because they contained confessions (164a). Wittebort did not recall giving the recordings to the prosecutor that handled

² Joint Exhibit 12, the eight page Pontiac Police Report [dated 6-30-08 and 7-2-08], was not included in its entirety in defendant's appendix, so it is included in its entirety in Appellee's Appendix (153b-160b). Because Joint Exhibits 1-5 were DVDs of witness statements, defendant did not include them in his appendix. However, defendant forwarded 24 copies of Joint Exhibit 1 [Holloway I recording], Joint Exhibit 3 [Griffin recording], Joint Exhibit 4 [Chambers recording] and Joint Exhibit 5 [Holloway II recording] to this Court, and the People will reference them as cited herein.

the preliminary hearing (168a). Wittebort said he had the original recordings and dropped off copies for the trial prosecutor with the receptionist at the prosecutor's office, but he did not know when he did so (164a, 168a).

Wittebort said he was not concerned about Heather Holloway's identification of defendant as the shooter (165a). He also indicated that no promises were made to the witnesses in order to obtain statements from them (165a, 167a). Wittebort admitted that Chambers was told that the police were only interested in the person who shot and killed the victim (166a). Wittebort said he had no say who the prosecutor would charge with a crime (167a). Wittebort had testified at trial that the recordings existed (168a). Wittebort turned over the original recordings to the appellate prosecutor on December 6, 2011 (168a, 161b-162b).

Wittebort said there were no audio recordings for Blevins or Wooten because they were interviewed in rooms where the recording equipment was not working properly (173a-174a). Wittebort investigated 34 homicides in 2008 (162b). He admitted when speaking to the appellate prosecutor that he did not remember if defendant's case had gone to trial or if a plea had taken place (163b). Although Wittebort initially testified he was not at the preliminary examination (165a), he was impeached with the preliminary examination transcript reflecting the fact that he was at that hearing (163b). Wittebort never hid the fact that the DVDs existed, and testified to the existence of the recordings at trial (165b-166b).

Wittebort said he was not concerned that the recorded interviews would hurt the case (165b). Wittebort admitted that during the recorded interview with Holloway, he told her, "We don't care about drugs, we're not the drug police; we want to know about the murder" (166b). Wittebort said that his comments to Holloway were a fairly standard method of interrogation (166b). Even after Wittebort told Holloway the police did not care about the drugs, she still lied

(167b). The fact that Holloway had lied during the first interview was brought up at trial (169b). Wittebort never suggested to Holloway what he wanted her to say (167b). In addition, Wittebort never suggested to Chambers what he wanted him to say especially due to the fact that when Chambers was interviewed, the police did not know who the shooter was (167b-168b). When Detective Buchmann told Chambers he was not being charged with "shit", it was at the very end of the interview and Chambers had already told what had happened (169b). Wittebort admitted it was never a secret that Holloway or Chambers had not been charged with drug offenses (169b).

During Holloway's recorded interviews, she indicated at one point that "I think that's him" (169b). Within the same page of the transcript Holloway said, "I know that's him" (170b). A portion of Joint Exhibit 5 was played for the court, beginning at approximately 8:49:53. (170b-174b; Holloway II recording). The DVD was stopped at approximately 8:53:30 (174b). The prosecutor wanted to focus on Holloway's identification of defendant and her circling of defendant's photograph (174b).

Wittebort admitted that he was present when Holloway identified defendant during her witness interview and he was present during defendant's trial (174b). The defense theory was that Holloway identified defendant because she was afraid of Chambers (174b). In her recorded statement, Holloway said she thought Chambers was involved in the murder (174b). Her recorded statement was direct evidence that she was not afraid of Chambers (174b). In her recorded statement, Holloway said that defendant reminded her of Snoop Dog, who is a popular music figure (175b). Wittebort said he knew what Snoop Dog looked like and People's Exhibit I, a picture of Snoop Dog was admitted into evidence (175b-176b, 181b). A photograph of defendant and the photo lineup in which Holloway identified defendant were also admitted into evidence (100a, 176b-179b).

After Holloway identified defendant in the photo array, she asked if he was light skinned (178b). People's Exhibit III was a photograph of defendant from OTIS (offender tracking information system) reflecting the fact he was light skinned (178b, 180b).

The trial court said it did not matter who did not turn over the audio recordings, only that they were not turned over (185a). The parties recognized that in Joint Exhibit 1, there was a conversation with Heather Holloway and Melvin Wooten and they are talking on the telephone with Glenn Griffin (185a; Holloway I recording). That portion of the DVD recording was not included in the transcription, but was part of the record (186a).

During the continuation on the argument concerning the alleged *Brady* violation, the parties recognized that all the written witness statements and the police reports had been provided to defense counsel (182b). The photo array had been provided to defense counsel prior to trial (183b-184b). The parties agreed that it was very improbable that the photo array shown to Holloway during her second interview was the same photo array shown to her during her first interview because defendant's name had not even been mentioned at the time Holloway was initially interviewed (184b).

The trial court did not recollect how defendant was identified at trial and asked if Holloway had identified him (185b). The court indicated that when impaneling a jury pool and a peremptory challenged is utilized, "It's a whole new ball game" (186b). In dealing with the reality of uncertainty that the new evidence would yield a different verdict, the court asked, "[W]ouldn't an argument that a court ought to err on the side of granting a new trial to a defendant be the proper outcome?" (187b).

The trial court's ruling in its entirety is as follows:

[Court]: Okay. Court has heard the arguments, considered the evidence, the law. Court finds the likelihood is great enough to undermine confidence in the outcome of the trial. The Court adopts the defendant's argument save its theory of the case. That'll be the ruling of the Court [188b].

ARGUMENT

I. THE COURT OF APPEALS' DECISION IN *PEOPLE V LESTER*, CORRECTLY ARTICULATES WHAT A DEFENDANT MUST SHOW TO ESTABLISH A *BRADY* VIOLATION.

STANDARD OF REVIEW:

Whether the decision in *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998), correctly articulates what a defendant must show to establish a *Brady* violation is a question of law which this Court reviews de novo. *People v Sierb*, 456 Mich 519, 522-524; 581 NW2d 219 (1988).

ANALYSIS:

"Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v Cain*, 565 US ___; 132 S Ct 627, 630; 181 L Ed 2d 571 (2012), citing *Brady*, 373 US at 87.³ The right protected by the *Brady* rule is "the defendant's right to a fair trial mandated by the Due Process Clause of the [Fourteenth] Amendment⁴ to the Constitution." *United States v Agurs*, 427 US 97, 107; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Reversal is only required if the failure to

³ The prosecution's affirmative duty to disclose favorable evidence traces "its origins to early 20th-century strictures against misrepresentation." *Kyles v Whitley*, 514 US 419, 432; 115 S Ct 1555; 131 L Ed 2d 490 (1995), citing *Brady*, 373 US at 86 (relying on *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935)(state presented testimony known to be perjured), and *Pyle v Kansas*, 317 US 213, 215-216; 63 S Ct 177; 87 L Ed 214 (1942)(state presented testimony known to be perjured and state deliberately suppressed favorable evidence).

⁴ US Const, Am XIV provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Michigan Constitution, Const 1963, art 1 § 17 provides that "no person shall be ... deprived of life, liberty or property, without due process of law." This Court has interpreted the state constitutional provision as coextensive with the federal provision for certain due process claims. See *Sierb*, *supra* at 523. Our state constitution may not provide less protection to a defendant than the federal constitution, "because the federal Supremacy Clause, US Const, art VI, cl 2, requires that we apply the federal constitutional analogue to the degree that our Constitution provides less protection to a criminal defendant." *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004), citing *California v Ramos*, 463 US 992; 103 S Ct 3446; 77 L Ed 2d 1171 (1983).

disclose favorable evidence denied defendant a fair trial. *United States v Bagley*, 473 US 667, 675-686; 105 S Ct 3375; 87 L Ed 2d 481 (1985), citing *Brady*, 427 US at 108.⁵

There is no general constitutional right to discovery in criminal cases, *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977), and *Brady* did not create one. *Pennsylvania v Ritchie*, 480 US 39, 52; 107 S Ct 989; 94 L Ed 2d 40 (1987). Instead, *Brady* is a rule of fairness, not a rule of discovery. *Bagley*, 427 US at 675; *Agurs*, 473 US at 107. Although *Brady* prohibits the prosecution from withholding favorable and material evidence from the defense, it does not require the prosecution to conduct the defendant's investigation. See *People v Verdugo*, 50 Cal 4th 263, 288-289; 113 Cal Rptr 3d 803; 236 P3d 1035 (2010). *Brady* did not relieve defendants from the obligation to investigate and prepare their cases for trial. *Yearby v State*, 414 Md 708; 997 A2d 144 (2010).⁶

The Michigan Court of Appeals has articulated a four prong test to determine whether there has been a *Brady* violation warranting a new trial. *Lester*, *supra* at 281-282.⁷ In *Lester*, *supra*, the Michigan Court of Appeals held that in order to establish a *Brady* violation, the defendant must show (1) that the state possessed evidence favorable to the defendant; (2) *that*

⁵ See Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L Rev Disc 74, 78 (2013) ("the [United States Supreme] Court did not establish *Brady* as a mechanism by which to grade or second-guess prosecutors' behavior. Rather, it is a rule for courts to determine whether a fundamental injustice has likely occurred").

⁶ "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense attorneys also have an ethical duty to conduct an investigation of the circumstances of the case. See Levenson, *supra* at 87, n 54, citing ABA, Criminal Justice Standards; Prosecution and Defense Function § 4-4.1 (3d ed. 1993). See also MRPC 1.3 ("a lawyer shall act with reasonable diligence and promptness in representing a client").

⁷ In articulating the four part test, the Michigan Court of Appeals cited to *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989), which in turn cited to *United States v Valera*, 845 F2d 923, 927-928 (CA 11, 1988), which quoted *United States v Prior*, 546 F2d 1254, 1259 (CA 5, 1977) ("[t]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself").

the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Id.*, emphasis added.⁸

The United States Supreme Court has never expressly articulated a four prong test for determining whether an alleged *Brady* violation warrants a new trial, but has instead listed “three components of a true *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.” *Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999).⁹

Whether the *Brady* test is three or four prongs is not the determinative factor when evaluating if a defendant’s due process rights were violated. Instead, as the Washington Supreme Court has recognized, “[a]s we conduct our analysis under *Brady*, we consider not only its discrete elements but also its animating purpose as well. ‘The animating purpose of *Brady* is to preserve the fairness of criminal trials.’” *State v Mullen*, 171 Wn 2d 881, 895; 259 P3d 158 (2011), citations omitted.

The only significant difference between the *Strickler* test and the *Lester* test is the inclusion of the second prong of the *Lester* test, specifically, that the defendant must show he did

⁸ Accord *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009); *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007); *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005); *People v Aldrich*, 246 Mich App 101, 134; 631 NW2d 67 (2001)(Whitbeck, J., concurring); *People v Fox*, 232 Mich App 541, 549; 591 NW2d 384 (1998).

⁹ Accord *Skinner v Switzer*, ___ US ___, 131 S Ct 1289, 1300; 179 L Ed 2d 233 (2011); *Banks v Dretke*, 540 US 668, 691; 124 S Ct 1256; 157 L Ed 2d 1166 (2004).

not possess the evidence nor could he have obtained it with reasonable diligence.¹⁰ That prong is not an unauthorized expansion of *Brady, supra*, but simply a clarification. Initially, if the defendant possessed the evidence, the evidence was not “suppressed” by the prosecution and/or the defendant would be unable to show the necessary prejudice for the prosecution’s failure to disclose the evidence.¹¹ Additionally, since the purpose of *Brady* is to prevent unfair trials, requiring defendants to exercise due diligence to obtain the exculpatory evidence is appropriate if the defense was or should have been aware¹² of the potentially exculpatory evidence.

The Michigan Court of Appeals, along with other state¹³ and federal

¹⁰ Although the third prong of test set forth in *Strickler* requires a showing that “prejudice must have ensued,” the United States Supreme Court has held that prejudice will occur if there is a reasonable probability that had the evidence been disclosed the result of the proceeding would have been different, *Smith*, 132 S Ct at 630, which is entirely consistent with the language set forth in the fourth prong of the test set forth in *Lester, supra*.

¹¹ See *Levenson, supra* at 77-78 (“[t]he due diligence rule is an offshoot of a more reasonable concept that if the defendant had the exculpatory evidence at the time of trial, even if it came from a source other than the prosecution, it makes little sense to demand the retrial of the case”).

¹² Constructive knowledge is assessed under a reasonable person standard. *Yearby*, 414 Md at 724, citing *Ware v State*, 348 Md 19, 39; 702 A2d 699 (1997)(“State is not relieved of its *Brady* obligation ‘unless a reasonable defendant would have looked to that public record in the exercise of due diligence’”).

¹³ See *Freeman v State*, 761 So 2d 1055, 1061-1062 (Fla, 2000)(defendant must prove he did not possess the evidence and could not have obtained the evidence by the exercise of reasonable diligence); *Hester v State*, 292 Ga 356, 358; 736 SE2d 404 (2013)(followed the four-prong test which required the defendant to show that he did not possess the favorable evidence and could not obtain it with any reasonable diligence); *Shelby v State*, 986 NE2d 345, 358 (Ind App, 2013)(reciting a three prong test, the court held that the state will not be found to suppress evidence if it was available to the defendant through the exercise of reasonable diligence); *State v Wilson*, 41 Kan App 2d 37, 51; 200 P3d 1283 (2008)(“evidence for *Brady* purposes is deemed ‘suppressed’ if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence”); *State v Harper*, 53 So 3d 1263 (La, 2010)(state is not obligated to furnish defendant with information he already has or can obtain with reasonable diligence); *Yearby*, 414 Md at 724, citing *Ware*, 348 Md at 39(no *Brady* violation when defendant knew or should have known facts permitting him to access the undisclosed evidence); *Expose v State*, 99 So 3d 1141, 1150 (Miss, 2012)(referenced the four prong test which includes requiring defendant to show that he did not possess the evidence nor could he obtain it himself with any reasonable diligence); *State v Ellison*, 364 Mont 276, 281; 272 P3d 646 (2012)(no *Brady* violation when defendant or his counsel knew about the alleged exculpatory information but made no effort to obtain its production); *Steese v State*, 114 Nev 479; 960 P2d 321, 331 (Nev, 1998)(*Brady* does not apply if the defendant could have obtained the information from other sources); *State v Clark*, 2012 ND 135; 818 NW2d 739, 746

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courts,¹⁴ recognize:

“Aware of the existence of potentially exculpatory information, a defendant cannot sit idly by in the hopes that the prosecution will discover and disclose that information and, when the prosecution does not do so, seize upon the prosecution’s conduct as grounds for habeas relief.” [*Stockton v Murray*, 41 F3d 920, 927 (CA 4, 1994)].

Stockton is consistent with existing United States Supreme Court precedent. In *Agurs*, 427 US at 103, the Court recognized that the rule of *Brady* applies in three quite different situations, “[e]ach involves the discovery, after trial, of information which had been known to the prosecution *but unknown to the defense*.” In *Kyles*, 514 US at 437, the Court held that “showing that the prosecution knew of an item of favorable evidence *unknown to the defense* does not amount to a *Brady* violation without more.” If the defense knew of potentially favorable

(2012)(followed the four-prong test which required the defendant to show that he did not possess the favorable evidence and could not obtain it with any reasonable diligence); *Commonwealth v Chmiel*, 612 Pa 333, 365-366; 30 A3d 1111 (2011)(3 prong test, but no *Brady* violation if the defendant knew or with reasonable diligence could have uncovered the evidence in question); *Porter v Warden*, 283 Va 326, 332; 722 SE 2d 534 (2012)(“pursuant to *Brady*, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense”); *State v Rooney*, 189 Vt 306; 2011 VT 14; 19 A3d 92 (2011)(no *Brady* violation because everyone knew about the validation studies in question); *State v Bisner*, 2001 UT 99; 37 P3d 1073, 1082 (2001)(courts refuse to overturn convictions where the defendant reasonably should have known of the evidence); *Mullen*, 171 Wn 2d at 895-896 (where the defendant has enough information to ascertain supposed *Brady* material on his own, there is no suppression by the government).

¹⁴ “All federal courts of appeal, except the Tenth and D.C. Circuits, apply some form of the defendant due diligence rule.” See Weisburd, *Prosecutors Hide, Defendant’s Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L R 138, 153 (2012), n 80. The Third, Seventh, and Ninth Circuits waver between applying and not applying the due diligence rule. *Id.* at 153, n 81. In addition, the Sixth Circuit is now also wavering between applying and not applying the due diligence rule. Cf. *United States v Tavera*, ___ F3d ___ (CA 6, dec’d 6/20/13)(following *Brady*, *Strickler and Banks*, the *Tavera* court declined to adopt the due diligence rule) to *Jalowiec v Bradshaw*, 657 F3d 293, 311 (CA 6, 2011), citing *Coleman v Mitchell*, 268 F3d 417, 438 (CA 6, 2001) and *Benge v Johnson*, 474 F3d 236, 243 (CA 6, 2007)(*Brady* rule should not apply if a defendant is aware of essential facts that would allow him to take advantage of the exculpatory evidence at issue). See also 41 Geo L J Ann Rev Crim Proc 233, 370, n 1113 (2012); *Bisner*, 37 P3d at 1082, n1 and cases cited therein; *Mullen*, 171 Wn 3d at 896, n 5 and cases cited therein.

evidence but failed to act with reasonable diligence to obtain the evidence, *Brady* does not warrant reversal.¹⁵

The People agree that prosecutors should be obligated to turn over favorable evidence known to them or known to others acting on the government's behalf that is "practically unavailable" to the defense.¹⁶ See *Tavera*, ___F3d___ (Clay, J., dissenting). However, if a defendant is aware or should have been aware of the existence of potentially favorable evidence, requiring a defendant to exercise due or reasonable diligence to obtain that evidence is consistent with the purpose of the *Brady* rule which is "not to displace the adversary system as the preliminary means by which truth is uncovered, but to ensure that miscarriage of justice does not occur." *Bagley*, 473 US at 675.¹⁷

Defendant argues that the United States Supreme Court in *Strickler*, *supra* and *Banks*, *supra* suggests that requiring defendants to exercise due or reasonable diligence to uncover favorable evidence is inconsistent with the rationale of *Brady*. Defendant is mistaken, however, because neither case disavowed the well-recognized requirement that the defense must exercise due diligence in investigating its case.

¹⁵ See footnotes 13 and 14, *infra*.

¹⁶ Some courts have held that there is no *Brady* violation if the evidence is equally accessible to the defense and the prosecution. *Freeman*, *supra* at 1062. See also *Johns v Bowersox*, 203 F3d 538, 545 (CA 8, 2000)(defendant must exercise reasonable diligence but evidence must be equally accessible to the prosecution and the defense); *Blanco v Sec'y, Fla. Dep't of Corrections*, 688 F3d 1211, 1243-1244 (CA 11, 2012), citing *Maharaj v Sec'y of the Dep't of Corrections*, 432 F3d 1292, 1315 (CA 11, 2005), n 4 (no suppression if the defendant knew of the information or had equal access to obtaining it).

¹⁷ In *Bagley*, the Court recognized that the *Brady* rule requiring the prosecutor to assist the defense in making its case represented a limited departure from a pure adversary model but was necessary since the prosecutor's role is not just to win a case, but to ensure that justice is done. 473 US at 676, n 6 citing *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 2d 1314 (1935). Nonetheless, "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Bagley*, 473 US at 676, n 7.

In *Strickler, supra*, the United States Supreme Court found that the federal appellate court erred in ruling that the defendant had not established the required “cause” for excusing his procedural default for failing to raise his *Brady* claim in state court.¹⁸ The federal appellate court had found insufficient cause because the defense knew that government officials had interviewed a key witness and could have filed appropriate discovery motions in state court. The United States Supreme Court rejected the lower court’s analysis finding that, “if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.” *Strickler*, 527 US at 284, n 23. The Court noted that although the defense must have known that a key prosecution witness had multiple interviews with the police, it had no way of knowing that records pertaining to the interviews and notes the witness sent to the police existed and had been suppressed.¹⁹ *Strickler*, 527 US at 285. In making this finding, the Court specifically recognized it was not reaching the issue whether the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them.²⁰ *Strickler*, 527 US at

¹⁸ Quoting *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986), the Court indicated:

[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials,’ made compliance impracticable, would constitute cause under this standard. [*Strickler*, 527 US at 283, n 24, citations omitted].

¹⁹ The Court found that the suppression of those documents constituted one of the causes for failure to assert the *Brady* claim in state court. *Strickler*, 527 US at 282. See also *Banks*, 157 L Ed 2d at 1190 (“a petitioner shows ‘cause’ when the reason for his failure to develop facts in state-court proceedings was the State’s suppression of the relevant evidence”).

²⁰ Under a somewhat different procedural posture, the United States Supreme Court in *Williams v Taylor*, 529 US 420; 120 S Ct 1479; 146 L Ed 2d 435 (2000) addressed a similar issue as to the one left open in *Strickler, supra*, specifically, the resulting consequences when the defense is aware of potentially

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288, n 33. *Strickler* did not disavow the due diligence requirement, but merely found that a greater level of diligence would have been needed to uncover the evidence in question.

Like the decision in *Strickler, supra*, the decision in *Banks, supra*, does not preclude a finding that the defense is required to exercise due diligence to obtain potentially favorable evidence. In *Banks*, the Court recognized that the state had “persisted” in hiding a witness’ informant status and misleadingly represented that it had complied in full with *Brady* disclosure obligations. 157 L Ed 2d at 1191. The Court found that the prosecution deliberately deceived the court and jurors by presenting false testimony. *Id.* The Court noted that “[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such materials has [sic] been disclosed.” 157 L Ed 2d at 1192. The Court rejected the prosecution’s argument that “the prosecution can lie and conceal and the prisoner still has the burden to ...discover the evidence.” 157 L Ed 2d at 1193. The Court found that “a rule thus declaring ‘prosecutor may hide, defendant must seek’ is not tenable in a system constitutionally bound to accord defendants due process.” *Id.* The Court indicated that “prosecutors’ dishonest conduct or unwarranted concealment should attract no judicial

favorable evidence during his state habeas proceeding but failed to exercise due diligence in developing the claim in state court. In *Williams, supra*, the petitioner alleged for the first time in his federal habeas petition that state prosecutors had violated *Brady*. The United States Supreme Court recognized that the petitioner had not exercised the diligence required to preserve, for federal habeas review, his claim that the nondisclosure of an alleged confederate’s psychiatric reports violated *Brady*. 529 US at 437-438. The petitioner’s state habeas counsel attached to his state habeas petition a copy of a transcript that should have alerted counsel “to a possible *Brady* claim.” 529 US at 438. The Court recognized that the transcript put the petitioner’s state habeas counsel on notice of the report’s existence and possible materiality. *Id.* The Supreme Court held that “**given knowledge of the report’s existence and potential importance, a diligent attorney would have done more.**” *Id., emphasis added.* The Court faulted the petitioner not for failing to obtain an undisclosed report from another source, but for failing to develop the factual basis for his *Brady* claim in state court. Because the petitioner failed to develop the factual basis of his *Brady* claim in state court, the Supreme Court agreed that an evidentiary hearing on the *Brady* claim was barred in federal court. *Id.*

approbation.” *Id.* *Banks*, like *Strickler*, did not disavow the reasonable or due diligence requirement. Instead, it recognized the obvious -- prosecutors cannot lie and conceal evidence to obtain a conviction.

Placing the diligence requirement in the proper prospective, requiring defendants to exercise due or reasonable diligence is consistent with *Brady*’s overarching concern that defendants receive fair trials. In addition, the requirement would discourage gamesmanship from both the prosecution and the defense. For example, if the government is hiding information and the information is not known to the defense, no amount of diligence could uncover the evidence. However, when defendants are aware of potentially favorable evidence and the evidence is readily available to the defense upon the exercise of reasonable diligence, they should not be rewarded if the government fails to turn the information over.²¹ “Information that is not merely available to the defendant but is actually known by the defendant would fall outside of the *Brady* rule.” *Fullwood v Lee*, 290 F3d 663, 686 (CA 4, 2002), citing *West v Johnson*, 92 F3d 1385, 1399 (CA 5, 1996).

The second prong of *Lester* is not an unauthorized expansion of *Brady, supra*. In fact, the Court in *Brady* never articulated a “test” to determine whether reversal was warranted for the prosecution’s failure to turn over favorable evidence to the defense. Although a “test” was subsequently identified in *Strickler* [after the decision in *Lester, supra*], the United States

²¹ Such a practice would permit defendants to “lie in the weeds” and have convictions overturned based on favorable evidence they knew about at the time of trial and could have obtained upon the exercise of reasonable diligence even if the prosecution did not have actual knowledge of the evidence. See generally *People v Ward*, 459 Mich 602, 612; 594 NW2d 47 (1999). Even if the prosecution has no actual knowledge of the existence of potentially favorable evidence, the knowledge of the existence of *Brady* material by one agency of the government is imputed to the prosecution. *Kyles*, 514 US at 437 (prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf which includes the police).

Supreme Court has never prevented the inclusion of a condition that defendants exercise due or reasonable diligence when they are or should have been aware of potentially exculpatory evidence.²²

The People submit that the second prong of the test set forth in *Lester, supra* is simply a means by which to assess either the second or third prong of the test set forth in *Strickler, supra*. Evidence cannot be deemed to be “suppressed” by the prosecution (second prong of *Strickler*) if the defendant could have obtained the evidence by exercising reasonable diligence.²³ Likewise, evidence cannot be deemed to be “material” and resulted in prejudice²⁴ (third prong of *Strickler*) if the defendant had knowledge of the information and could have obtained the information with reasonable diligence.

What constitutes due or reasonable diligence will depend on the facts of each case. However, what is clear is that due diligence does not require “perfect vigilance and punctilious care, but merely a showing that reasonable efforts were put forth.” *Commonwealth v Edmiston*, 65 A3d 339, 348 (Pa, 2013), citing *Commonwealth v Selenski*, 606 Pa 51; 994 A2d 1083, 1089 (2010). Whether defense counsel acted diligently in ascertaining facts upon which a claim is

²² The United States Supreme Court has yet to grant certiorari on any of the numerous cases requiring defendants to exercise due diligence to support a *Brady* violation.

²³ See *Mullen, supra* at 896 (where a defendant has enough evidence to ascertain *Brady* material on his own, there is no suppression by the government, but the opposite result may occur if there was government action to throw the defendant off the path of the alleged *Brady* violation); *Bowersox, supra* at 545 (evidence is not suppressed if the defendant could have learned of the information by reasonable diligence); *Milke v Ryan*, 711 F3d 998, 1017-1018 (CA 9, 2013)(where a defendant does not have enough information to find *Brady* material with reasonable diligence, the State’s failure to produce the evidence is considered suppressed); *United States v Zichettello*, 208 F3d 72, 103 (CA 2, 2000)(evidence is not suppressed if the defendant knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence); *Maharaj, supra* at 1315 (there is no suppression by the government if the defendants had within their knowledge, prior to trial, information by which they could have ascertained the alleged *Brady* material).

²⁴ The terms “material” and “prejudicial” are used interchangeable when addressing the third prong of the test set forth in *Strickler*. *Mullen*, 171 Wn 2d at 897.

based must be measured in the context of counsel's reasonable reliance on the government's response to repeated discovery requests. *Id.*

The following parameters provide a framework for determining the defendant's burden under the second prong of the test set forth in *Lester, supra*, or for defendant's burden to show the evidence was "suppressed" and "material":

(1) If the defense obtained the evidence from another source, then *Brady* is not violated where the government fails to disclose favorable evidence because no evidence was "suppressed" and/or the defendant was not prejudiced.

(2) If the defense has or should have had knowledge of potentially favorable evidence, then it must exercise reasonable diligence to obtain the evidence.

(3) If the government hides potentially favorable evidence, and the defense has no knowledge of the potentially favorable evidence, then the evidence is "suppressed."²⁵

Conclusion

There is no due process violation when the accused knows before trial about the potentially favorable evidence but makes no effort to obtain its production. *Ellison*, 364 Mont at 281. *Brady, supra*, does not relieve the defense of its obligation to investigate the case and prepare for trial. *Yearby, supra* at 734; *Bagley*, 473 US at 39. Requiring defendants to exercise due diligence when they are or should have been aware of potentially exculpatory evidence would not encourage prosecutors to hide evidence, and is consistent with the premise that *Brady* is a rule of fairness, not a rule of discovery. *Bagley*, 473 US at 675; *Agurs*, 427 US at 107. "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. *Agurs*, 427 US at 108.

²⁵ The defense is not required to scavenge for hints of undisclosed *Brady* material. *Banks*, 157 L Ed 2d at 1192.

II. THE MICHIGAN COURT OF APPEALS DID NOT ERR IN REVERSING THE TRIAL COURT ORDER GRANTING DEFENDANT A NEW TRIAL. DEFENDANT FAILED TO MEET HIS BURDEN OF DEMONSTRATING A REASONABLE PROBABILITY THAT, HAD THE RECORDED WITNESS STATEMENTS BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT BECAUSE THE ACTUAL RECORDINGS WERE MORE BENEFICIAL TO THE PROSECUTION THAN TO THE DEFENSE.

STANDARD OF REVIEW:

Normally a trial court's decision to grant a motion for a new trial is reviewed for an abuse of discretion²⁶ which occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). However, the basis for the trial court's grant of a new trial in this case was an alleged *Brady* violation which implicates due process concerns. Whether defendant is entitled to a new trial due to an alleged *Brady* violation presents a mixed question of fact and constitutional law.²⁷ Findings of fact are reviewed under the clearly erroneous standard. MCR 2.613(C). A finding of fact is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008). Constitutional issues are reviewed de novo. *Sierb*, *supra* at 522.

²⁶ Discretion is not unbridled; it is exercised under law. See *Foskett v Foskett*, 247 Mich App 1, 13; 634 NW2d 363 (2001)(a trial court has discretion to be sure, but it does not and cannot have unbridled discretion). Discretionary choices are not left to the court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles. *Matter of Oil Spill by the Amoco Cadiz*, 954 F2d 1279, 1334 (CA 7, 1992). A trial court necessarily abuses its discretion when it makes an error of law. *People v Duncan*, ___ Mich ___, ___ NW2d ___ (Docket Nos. 146295 & 146296, dec'd July 30, 2013).

²⁷ *People v Salazar*, 35 Cal 4th 1031, 1042; 29 Cal Rptr 3d 16; 112 P3d 14 (2005)(mixed questions of law and fact, such as the elements of a *Brady* claim are subject to independent review); *Orellana v Commissioner of Corrections*, 135 Conn App 90, 100; 41 A3d 1088 (2012)(claims premised on *Brady* are a mixed question of law and fact and the conclusion that the defendant was not deprived of due process is subject to plenary review); *Starling v State*, 882 A2d 747, 756 (Del, 2005)(whether state has failed to disclose exculpatory evidence is reviewed de novo); *Aguilera v State*, 807 NW2d 249, 252 (Iowa, 2011); *James v Commonwealth*, 360 SW3d 189, 197 (Ky, 2012); *Thomas v State*, 45 So 3d 1217, 1219 (Miss App, 2010); *Mullen*, *supra* at 894; *Wilkening v State*, 2007 WY 187; 172 P3d 385, 386 (2007)(*Brady* due process violation claims are reviewed de novo); *Lay v State*, 116 Nev 1185, 1193; 14 P3d 1256 (2000)(*Brady* involves both legal and factual questions and is reviewed de novo).

ANALYSIS:

Judge O'Brien, who admittedly had insufficient recollection of defendant's trial,²⁸ granted defendant a new trial because the defense was not provided copies of recorded witness statements prior to trial which, according to Judge O'Brien, undermined confidence in the verdict.²⁹ The Michigan Court of Appeals disagreed and held that "the recorded interviews were either not favorable to defendant or their suppression did not undermine confidence in the outcome of the trial, or both" (6a). Upon an independent review of the *Brady* factors, this Court should agree with the decision of the Michigan Court of Appeals because defendant failed to meet his burden of showing that the nondisclosed recordings were favorable to him and/or that he could not have obtained the evidence with reasonable diligence. More importantly, even if the recorded witness statement were favorable to the defense and could not have been obtained with reasonable diligence, defendant did not meet his burden of showing a reasonable probability that had the evidence been disclosed, the outcome of the proceeding would have been different.

A. The recorded witness statements were not favorable to defendant.

Impeachment evidence as well as exculpatory evidence falls within *Brady* because if disclosed and used effectively, it "may make the difference between conviction and acquittal." *Bagley*, 473 US at 676. Some courts have found that impeachment evidence must be directly favorable to the accused and allowing defense counsel to better prepare for cross-examination is

²⁸ On a couple of occasions, Judge O'Brien implicitly admitted he did not have independent recollection of defendant's trial. He admitted he had a lot of trials "since then" and he did not recollect if the witness videos were played at trial (183a-184a). He also asked the parties to assist his recollection by answering his question, "[W]hat pinned – what was the identification of this defendant? Was it Heather Holloway testifying live in court?" [185b].

²⁹ Two of the witnesses with recorded police interviews did not testify at trial, specifically Delvalle and Griffin. The transcripts of the recorded interviews were not in existence at the time of trial. The police reports of the witness interviews and written witness statements had been provided to the defense prior to trial (89a, 153b-160b).

insufficient grounds to establish a *Brady* violation. *Cabrera v Delaware*, 840 A2d 1256, 1269 (Del, 2004), citing *Dawson v State*, 673 A2d 1186, 1193 (Del, 1996).³⁰ In fact, the Michigan Court of Appeals has found, “[w]e do not believe that even the most generous reading of the ‘favorable evidence’ standard would require the prosecution to disclose evidence whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness.” *People v Banks*, 249 Mich App 247, 255; 642 NW2d 351 (2002). However, this Court, in a different context [under a claim of newly discovered evidence] found that impeachment evidence need not directly contradict a particular statement in a witness’ testimony in order to grant a new trial.³¹ Nonetheless, if the undisclosed impeachment evidence is cumulative to evidence presented at trial, it would not be sufficient grounds for granting a new

³⁰ In *Dawson, supra* at 1193, the court noted:
The information sought was not favorable to Dawson’s case, as required by the second prong of the *Brady* test. In fact, Spence’s testimony was quite damaging to Dawson’s defense theory. Arguably, the information would have allowed defense counsel to prepare better for cross-examination and this enhanced preparation would have been favorable to the defense. This is not, however, the type of situation envisioned by the United States Supreme Court in *Bagley*, 473 US at 667, where the scope of *Brady* was enlarged to include impeachment evidence. *Bagley* contemplates a situation where the impeachment evidence is directly favorable to the accused, rather than simply providing a basis for investigation.

³¹ In *People v Grissom*, 492 Mich 296, 318; 821 NW2d 50 (2012), this Court outlined when impeachment evidence may be sufficient to grant a new trial when that evidence is newly discovered. This Court recognized that newly discovered impeachment evidence may justify a grant of a new trial in the rare case when (1) there is an exculpatory connection on a material matter between the witness’ testimony at trial and the new evidence and (2) a different result is probable on retrial. *Id.* at 319. This Court cited to *United States v Quiles*, 618 F3d 383, 392 (CA 3, 2010) for the proposition that there must be a factual link between the heart of the witness’ testimony at trial and the new evidence, and the link must suggest directly that the defendant was convicted wrongly. *Grissom, supra* at 315-316. This Court noted that a new trial was warranted because the newly discovered evidence called into question whether the crime actually occurred. *Id.* at 331. However, this Court specifically recognized that the impeachment evidence need not directly contradict a particular statement in a witness’ testimony. *Id.* at 318.

In dissent, Justice Zahra disagreed with the majority ruling that impeachment evidence need not contradict specific testimony at trial. *Id.* at 342. Judge Zahra believed that “new impeachment evidence could make a different result probable on retrial only if it directly contradicts material trial testimony in a manner that tends to exculpate the defendant.” *Id.* at 342-343. Justice Zahra recognized that the *Brady*

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trial.³²

The defense theory of this case at trial was that Chambers was the shooter (2b) and Holloway identified defendant instead of Chambers as the shooter because she was afraid of Chambers (192b-193b). To support this theory, defense counsel impeached Holloway at trial with the fact she did not mention Chambers in her written statement (104b, 110b), and he followed up on his theory by questioning Detective Wittebort about whether Holloway mentioned Chambers in her written statement (137a). In addition, the police reports that defendant had access to at the time of trial, which included a summary of Holloway's two verbal police statements, included no mention of Chambers (104a-105a). Defense counsel used Holloway's failure to implicate Chambers in her statements to the police to his advantage during closing argument when he indicated:

She says – Heather says, ‘I told the police the truth the second time.’ Now, that sounds like a kid says, ‘You caught me the first time and I tell the truth this time. I’ll tell the truth this time, so just keep asking and I’ll eventually tell you another truth.’ I’m saying that because she didn’t mention Jared. And I’m saying there is no mention of Jared, why would you not mention Jared? This is the man you talked to on the phone. This is a man who you know has a business relationship with your deceased loved one.

standard for granting a new trial is more “defendant-friendly” than for newly discovered evidence claims, but even under *Brady*:

“[t]he force of impeachment evidence . . . is diminished when the witness’s testimony is supported by substantial corroborating evidence or when the impeachment evidence is cumulative or collateral,” *United States v Ramos-Gonzalez*, 747 F Supp 2d 280, 291 (D PR, 2010), citing *United States v Connolly*, 504 F3d 206, 217 n 6 (CA 1, 2007); see also *Smith v Cain*, 565 US ___, 132 S Ct 627, 630; 181 L Ed 2d 571 (2012) (“We have observed that evidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict”). [*Grissom, supra* 354, n 38, *Zahra, J., dissenting*].

³² See *United States v Emor*, 573 F3d 778; 387 US App DC 309 (2009)(recordings of nondisclosed police interviews could not have been used as substantive evidence and defendant failed to show how use of recordings would have been anything more than cumulative of cross-examination he could have conducted using notes of the interview).

Why would you not say, 'Well, let me tell you something, Officer, I don't know who that shooter was, but I know Jared was there maybe he can help you. Maybe he can help us find out.' She hid it from the police. She hid the fact that Jared was in the car. She tells the police she's scared. Think about that. We ask you to judge her credibility, think about it [193b].

What the trial court failed to consider when issuing its perfunctory "opinion" granting defendant a new trial was the fact that Holloway's second recorded police interview supported the prosecutor's theory and undermined the defense theory. The Michigan Court of Appeals specifically recognized that Holloway's "recorded interview contravened defendant's theory of the case" (8a). During the second recorded interview, Holloway talked about Jared [Chambers] and she said she heard he was the one "setting it up" (91a, 95a). While crying,³³ Holloway said that she thought Chambers knew something was going on because defendant was trying to get Chambers to get the dope and not to have to deal with Harris (96a). She asked the police, "So why didn't Jarred [sic] know something and not do it?" (96a). The recorded statement directly refutes defendant's claim at trial that Holloway only identified defendant because she was protecting Chambers.

Defendant argues that the suppressed evidence was favorable to the defense because it undermined Holloway's identification of defendant and it revealed that promises were made to Holloway and Chambers for their testimony. The Michigan Court of Appeals disagreed with defendant's argument (6a-9a). Upon an independent review of the previously undisclosed evidence, this Court should agree with the well-reasoned decision from the Michigan Court of Appeals.

³³ The actual recording (Holloway II recording, starting at approximately 08:54) must be viewed in conjunction with the transcript, because only the recording demonstrates Holloway's demeanor during the interview. The written transcript of the recording does not include any reference to the fact that Holloway was crying when she made the statement.

Holloway's identification of defendant was strong.

During the evidentiary hearing and argument on defendant's motion for new trial, defendant argued that the recorded statements showed that Holloway confused the shooter with the nonshooter and she did not get a good look at the shooter. However, after reviewing all the evidence presented at trial, in addition to the previously undisclosed recorded statements, it is abundantly clear that the exact opposite is true.

In Holloway's first statement, she said she had only seen the shooter and did not see the other individual at all (65a, 80a).³⁴ In her second statement she said she did not see the second guy, the "Jarred [sic] guy" at all (97a). At the preliminary examination, Holloway said she did not recognize Chambers because she "didn't really look at him, I just knew that that's who we were going to meet" (195b).³⁵ How could Holloway have confused the shooter with the nonshooter when she did not actually see the nonshooter?

Contrary to defendant's assertion, Holloway did get a good look at the shooter. Shortly after the shooting when she was questioned by Officer Lasseigne at the hospital, Holloway told Lasseigne she did not know the shooter but would recognize him if she saw him again (13b). Holloway always maintained that she saw the shooter's face (65a). Although Holloway initially replied, "not that good" when asked during a later police interview at the police station if she "saw his [the shooter's] face pretty good," she immediately went on to say if she saw the shooter

³⁴ When asked if she saw the faces of either of the two men involved in the shooting, Holloway replied, "The one that shot I seen his face, the other guy, I didn't see nothing, he was long gone" (65a).

³⁵ Admittedly at trial [that occurred almost two years after the murder], Holloway testified that she recognized Chambers as the individual that got in behind her seat (125a-126a). Holloway could have been impeached with her preliminary examination where she testified she did not recognize Chambers because she did not really look at him (195b). Her recorded witness statements did not contain sufficiently different evidence regarding the identification or lack of identification of Chambers than did her preliminary examination testimony. In any event, even if Holloway did recognize Chambers as being on the scene, she never testified he was the shooter.

again, she might be able to say it was him (65a). She indicated the shooter had the complexion of one of the light skinned police officers, and demonstrated with her hands how the shooter's face and facial hair looked (65a, 79a-80a; Holloway I recording, approximately 00:01:03).³⁶ Holloway described the shooter as tall with a skinny face (79a-80a). Holloway was shown some photographs during the first interview but could not identify the shooter (86a). Holloway compared the shooter with the individuals in the first photographic lineup, indicating the fact that the shooter's skin color was not as dark or light as some of the individuals in the photographic showup (86a).³⁷ Holloway said she saw the shooter when the car light came on when he opened the door (87a). She demonstrated the angle she viewed the shooter and his high cheek bones, thin sideburns and hair circling his mouth (87a; Holloway I recording, approximately 00:14:15).

Holloway's description of the shooter in the second recorded statement was consistent with her description in the first recorded statement which supports the reliability of her identification. See *Kyles*, 514 US at 444 (reliability of a description depends in part on the accuracy of the prior description). When Holloway was asked if she saw the shooter's face, she indicated she had been going on MySpace and OTIS to try to figure out who he was (93a). She described to the police by words and actions how the shooter's face looked (94a; Holloway II recording, approximately 08:50).³⁸ Holloway said that the shooter had a "Snoop Dog face," and

³⁶ This Court should review the actual recording to get the complete representation of Holloway's description of the shooter. (Holloway I recording, approximately 23:32, 00:01, 00:12, and 00:14). In the recorded interview, Holloway demonstrated with her hands the fact that the shooter had thin sideburns, facial hair circling his mouth, and high cheekbones. (Holloway I recording).

³⁷ The trial court asked the parties if defendant's photograph was in the first photographic lineup, and the parties agreed that it was improbable because the police were not yet aware of defendant's involvement in the murder when the first lineup was shown to Holloway (184b).

³⁸ The actual tape recording must be viewed because it shows Holloway putting her hands up to her face and pushing her cheeks. The tape also demonstrates Holloway's demeanor [she's crying], which is not reflected in the transcript of the recording. (Holloway II recording, approximately 8:50:54).

he had side burns and facial hair (94a). Within five seconds of seeing the photographic showup with defendant's picture, she picked out defendant's picture and said, "This guy right here. This is him right here." She further indicated, "I think this is him, out of all these guys that looks the most, and then she asked, "Is he lite [sic] skinned?" As she is crying, Holloway says, "I know that's him" (96a; Holloway II recording, beginning at 08:53:13). Only after she identified defendant and said, "I know that's him," did she ask if his name was "Skyler" and whether Chambers had identified the same guy (96a-97a).

Defendant claimed that Holloway's identification of the shooter was flawed; however, by viewing the entirety of the identification as seen on the DVD, it is abundantly clear that her identification was very strong. Defendant claims that the officer had his finger on defendant's photograph when he showed the photographic display to Holloway which made the identification unduly suggestive. However, as can be seen by a review of Holloway's identification of defendant on the DVD, and as explicitly recognized by the Michigan Court of Appeals, the assertion that the officer's finger was on defendant's picture is "simply untrue" (8a). In the video recording of the photo identification, the detective can be seen placing the photographic lineup on the table, and his finger is next to the SECOND photograph. (Holloway II recording, beginning at approximately 08:55:13). Defendant's photograph was the first photograph. If Holloway only identified defendant in the lineup because she was told to do so by Chambers or some other party, or due to the manner Detective Buchmann handed the lineup to Holloway, why would she subsequently question the police whether Chambers had picked out the same individual and whether he was light skinned? (96a-97a). Holloway's identification of defendant as the shooter was extremely persuasive because, as can be seen in the recording of her

statement, she tapped defendant's photograph multiple times, circled the photograph multiple times, and was crying when she said, "I know that's him" (Holloway II recording, 08:53-08:54).

At the evidentiary hearing, the prosecution admitted the photographic showup (100a), a front view photograph of defendant showing his high cheek bones and facial hair around his mouth, a side view photograph showing his thin sideburns (179b), a photograph of Snoop Dog (181b), and defendant's OTIS picture reflecting the fact he was light skinned (180b). The shooter was always identified as light skinned. In comparison, during Glen Griffin's witness interview, he said that Chambers was "real dark," and "he looks lite [in the picture],³⁹ but he's way darker then [sic] me" (38a). The exhibits along with the previously undisclosed recorded statements clearly supported Holloway's identification of defendant as the shooter because as Holloway indicated, the shooter was light skinned, had facial hair around his mouth, thin side burns, high cheek bones, and looked similar to Snoop Dog.

The instant case is clearly distinguishable from the recent United States Supreme Court case of *Smith v Cain*, where the Court reversed the defendant's murder conviction because the prosecution's failure to turn over police notes prior to trial undermined the confidence in Smith's conviction. In *Smith*, the defendant's murder conviction was based on a single eyewitness' testimony. 132 S Ct at 630. That witness testified at trial that he had no doubt that the defendant was the gunman and he stood "face to face" with him the night of the crime. However, the undisclosed police notes reflected the fact that the witness said he could not identify anyone [three men were involved in the robbery and murder] because he could not see their faces and he would not know the gunmen if he saw them again. *Id.* In comparison, Holloway at all times

³⁹ Although the transcript of Griffin's police interview left out the words "in the picture," one can clearly hear in the audio recording that Griffin said, "He [Chambers] looks lite *in the picture*." (Griffin recording, 17:04).

indicated she had seen the shooter's face, and she could probably identify him if she saw him again. She also gave a description of the gunman which was consistent with defendant's physical description. Moreover, defendant was admittedly at the crime scene, and there was no evidence at trial or in the undisclosed witness statements that Holloway confused Chambers for defendant.

No "promises" were made to Holloway or Chambers in exchange for their trial testimony and no grant of immunity was given.

Defendant argues that the recorded witness statements were favorable to him because they showed that promises were made to Holloway and Chambers and they were in essence granted immunity. Admittedly, Holloway was told by the police that they did not care about the drugs. During the first interview, the officers told Holloway, "It's time, you just got to be straight up. We're not narcotics police we don't care, we don't give a fuck about drugs" (81a). Even though Holloway was told this information, she still lied during her first interview. Therefore, any alleged "promise" made to Holloway that she would not be charged with drug related offenses meant absolutely nothing to her because she still lied during the first interview.⁴⁰ During the second interview, Holloway implicated defendant as the shooter *before* she was told by the police that they did not care about her involvement in the drug deal (97a).

After the police interviewed Glen Griffin, they brought Chambers in for questioning. Even before the questioning of Chambers, the police knew Chambers had implicated a person by the name of "Skyler" in the shooting of Harris (29a), so any "promises" allegedly made to Chambers by the police did not result in him naming an innocent party during police interrogation.

⁴⁰ Holloway admitted at trial that she had initially lied to the police. Defense counsel used this fact to discredit her testimony (190b-192b).

It must also be noted that at the very beginning of Chambers' police interview he said, "[T]here are things I don't want to tell you guys.... Certain people that didn't have anything to do with anything I don't want their names brought up" (48a). Clearly defendant was not anxious to talk to the police. *Cf. Kyle*, 514 US at 513 (undisclosed statement to the police would have allowed the jury to infer that the witness was anxious to see the defendant arrested for the murder). In response to Chamber's statement that he did not want to talk, Detective Wittebort said, "That's not for you to decide so. You know the only thing you need to think of right now, is you looking out for you, unless, unless you feel you can do life in prison standing up" (48a). After the police told Chambers they were not the "dope police" and they did not care about the narcotics, Chambers said, "[I]t's not even me getting in trouble about it" (48a). Thereafter, Chambers told the police about the night in question and said an individual by the name of "Skyler" was the shooter (49a-54a). At that point, Chambers did not know "Skyler's" last name or where he lived (57a).

The police never made Chambers any "promises" for his testimony, but merely used investigative techniques to get to the truth. Lying to a suspect does not violate due process. See generally *United States v Lux*, 905 F2d 1379, 1382 (CA 10, 1990); *United States v Castaneda-Castaneda*, 729 F2d 1360, 1363 (CA 11, 1984)(lying to a suspect does not render a confession involuntary). In addition, defendant's entire defense was based on his theory that Chambers was the shooter and Holloway lied because she was afraid of Chambers. Whether or not Chambers was made promises by the police did nothing to support or negate that theory, especially since Chambers had implicated "Skyler" in the shooting before talking to the police.

Griffin's previously undisclosed recorded statement was favorable to the prosecution, not to the defense.

At the time of trial, the defense had information [from the police report outlining Glen Griffin's verbal police statement] that Wooten⁴¹ initially told Griffin that Chambers was the shooter (156b), so that information was not suppressed even though it was also included in Griffin's previously undisclosed recorded statement⁴² (27a-28a). After Griffin spoke to Wooten, he spoke with Chambers and Chambers told him some guy named "Skyler" was the shooter. (29a; 156b).⁴³ Griffin's previously undisclosed recorded statement reveals that when Griffin was being interviewed by the police, he was asked to call Chambers to find out where he was (39a). During the recorded conversation between Griffin and Chambers, which Chambers did not know was being recorded, Griffin asked Chambers why he did not just turn himself in because he did not do anything, and Chambers indicated, "I am, in a little bit" (40a). Chambers said he was trying to find the guy's [defendant's] last name, so the police could find him. Chambers was also trying to locate the type of car defendant arrived in the night of the shooting (39a-40a).

⁴¹ Defendant's assertion that Wooten was an "unofficial investigator" is misplaced. What is clear from the police reports and from Griffin's interview is that according to Griffin, Wooten initially told him that Chambers was the shooter, but that information was disclosed to the defense prior to trial (156b). The police reports that were disclosed to the defense also contained information that Wooten and Holloway spoke to Griffin on the night in question (154b-155b). The actual conversation between Holloway, Wooten and Griffin is completely consistent with Detective Wittebort's recitation of the conversation. (Holloway I recording, approximately 23:22-23:24). Contrary to defendant's assertion, there is no evidence that Chambers called Wooten on the night in question. What is clear from the record is that Chambers called Griffin or vice versa and implicated defendant as the shooter, but that information was disclosed to the defense prior to trial (156b).

⁴² See Levenson, *supra* at 90 (although the defense must be given fair access to exculpatory evidence, it need not be the best evidence or all evidence on the issue).

⁴³ In the Court of Appeals, defendant argued that the undisclosed recordings showed that Chambers was allegedly "feeding" information to the police. However, that information had been disclosed to the defense prior to trial, so his *Brady* argument on that claim necessarily fails because that evidence was not suppressed.

Griffin's recorded telephone conversation with Chambers, which was not initially disclosed to the defense, was consistent with Chambers previously undisclosed statement to the police. At the end of Chamber's interview, he told the police he was really close to finding out where defendant lived (58a). The fact that Chambers was trying to track down defendant could have been used by the prosecution to show why Chambers did not turn himself into the police. Chambers' credibility had been attacked at trial because he had not voluntarily gone to the police and reported the crime. For example, in opening statements, defense counsel asserted that Chambers was Harris' friend but did not call the police after the shooting (2b-3b). Defense counsel questioned Chambers about the fact that the police had to come to his house and pick him up (65b), and also questioned Wittebort about the fact that Chambers never did call the police (138a, 124b). In closing, defense counsel argued that Chambers was a friend of Harris, but he did not call the police and the police had to find him (194b). Defense counsel asked if Chamber's actions were consistent with an innocent person (194b). If the prosecution had known that Chambers was trying to find information about defendant prior to turning himself in, that evidence would have refuted counsel's argument that Chambers' actions were inconsistent with an innocent person.

Timely disclosure of Griffin's recorded statement would have given the prosecution information upon which to question Chambers about his reasons for not turning himself into the police. In addition, timely disclosure of Chambers and Holloway's recorded statements would not have "substantially affected the efforts of defense counsel to impeach the witnesses." *Emor, supra* at 783, citing *United States v Cuffie*, 80 F3d 514; 317 US App DC 38 (1996). Therefore, defendant did not meet his burden of establishing that the undisclosed evidence was favorable to him.

B. The recorded witness statements were not “material.”

The fourth prong of the *Brady* test as set forth in *Lester, supra*, and the third prong of the *Brady* test as set forth in *Strickler, supra*, addresses materiality. This Court must conduct an independent examination of the record in determining whether the suppressed evidence is material.⁴⁴

“[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 US at 682. “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 US at 433. A reasonable probability is different from a reasonable possibility. *Strickler*, 527 US at 291. Evidence that is “possibly useful” to the defense but not likely to have changed the verdict does not meet the *Brady* standard. *Bagley*, 473 US at 677, citing *Giolio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). In making a determination whether the suppressed evidence was material, the court is to consider the purported suppressed evidence collectively,

⁴⁴ *Buari v Kirkpatrick*, 753 F Supp 2d 282, 295 (SD NY, 2010), citing *United States v Orena*, 145 F3d 551, 558 (CA 2, 1998); *United States v Payne*, 63 F3d 1200, 1209 (CA 2, 1995). See also *State v Ortiz*, 280 Conn 686, 720-722; 911 A2d 1055 (2006)(trial court’s determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error); *Helm v State*, 1 P3d 635, 639 (Wy, 2000)(materiality is a mixed question of law and fact, and a reviewing court should conduct an independent examination of the record in determining whether the suppressed evidence is material); *Cobb v Thaler*, 682 F3d 364, 377 (CA 5, 2012)(whether the undisclosed evidence was material pursuant to *Brady* is a mixed question of law and fact); *Pederson v State*, 692 NW2d 452, 460 (Minn, 2005)(because materiality issues under *Brady* are mixed questions of law and fact, the proper standard of review is de novo); *State v Landano*, 271 NJ Super 1, 36-38; 637 A2d 1270 (1994)(materiality under *Brady* is a mixed question of law and fact).

not item-by-item. *Kyles*, 514 US at 436; *Bagley*, 473 US at 676-677. Moreover, “materiality pertains to the issue of guilt or innocence, and not to the defendant’s ability to prepare for trial.” *United States v Bencs*, 28 F3d 555, 560 (CA 6, 1994), citing *United States v Agurs*, 427 US 97, 112; 96 S Ct 2392; 49 L Ed 2d 342 (1976), n 20.

As noted in *Lester*, *supra* at 282-283:

In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness’ credibility would have undermined a critical element of the prosecutor’s case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. *United States v Payne*, 63 F3d 1200, 1210 (CA 2, 1995), cert den 516 US 1165; 116 S Ct 1056; 134 L Ed 2d 201 (1996).

In the instant case, both Holloway and Chambers, the key witnesses in the prosecution’s case, were subjected at trial to blistering cross-examinations by the defense, and at the very most, the “suppressed” evidence merely furnished an additional basis to impeach the witnesses whose credibility had already been shown to be questionable. *Lester*, *supra*. Even assuming that some of the material in the recorded witness interviews could have been used to further impeach these witnesses, where there has already been substantial impeachment of a witness at trial, any incremental impeachment obtained through use of material that had not been in the possession of the defense at trial does not raise a reasonable probability of a different result.⁴⁵

In addition to the fact that the two main witnesses had already been thoroughly impeached by defense counsel, the undisclosed evidence did nothing to support defendant’s case. Defendant testified at trial that he was on the scene on the night in question and was attempting

⁴⁵ See *Byrd*, *supra* at 518-519; *Payne*, 63 F3d at 1210; *United States v Phibbs*, 999 F2d 1053, 1090 (CA 6, 1993); *Orena*, *supra* at 559; *Pyles v Johnson*, 136 F3d 986, 1000 (CA 5, 1998).

to buy cocaine from Harris, but he was not the shooter. Chambers' testimony that defendant was the shooter was corroborated by Holloway (Tr II, 231), and partially corroborated by Blevins.⁴⁶ Blevins testified that although he did not see who actually shot Harris, he heard a gunshot and turned and saw defendant standing next to the driver's side of the car where Harris was located. (Tr II, 187).

Koch, defendant's friend, drove defendant, Chambers and Blevins to the crime scene – Chambers had just met Koch. After the shooting, defendant fled the scene in the car with Koch, but Chambers and Blevins took off on foot. Blevins testified he got out of the car because Koch pointed a gun at him and told him to get out (110a-111a). Blevins' testimony was corroborated by Holloway's previously undisclosed recorded statement because she told the police she heard someone in the other car say, "Get the fuck out [of] the car" (93a). Chambers called his mother to pick him up, and his mother testified he was frantic, and when she picked him up, he was hiding (111b-112b). Griffin told the police in the previously undisclosed statement that Chambers would not tell him where he was staying because he was scared (33a).

Other evidence presented at trial that negated defendant's theory that Chambers was the shooter was the fact that defendant was the individual that called Chambers to set up the drug deal, not vice versa (128b-130b). It was defendant, not Chambers, who wanted the drugs [and made Harris make "chunk" from "powder"] and had transportation to and from the crime scene. Chambers said he never saw the money from defendant (68b-69b), and although defendant said he gave the money to Chambers, as the prosecutor recognized in closing argument, it made no sense for defendant to give up his money [\$1000] without first seeing the cocaine (143b, 189b).

⁴⁶ The People admit that the Michigan Court of Appeals erred when it noted in the opinion that McBee-Blevins testified that defendant shot Harris in the head. (9a).

As previously indicated, the undisclosed evidence was actually more beneficial to the prosecution than the defense. It demonstrated that Holloway's identification of defendant as the shooter was strong, she had mentioned Chambers to the police in her second statement, and she corroborated Blevins' testimony that he was ordered out of Koch's car at gunpoint. She also told the police she thought Chambers must have been involved in the murder which completely destroyed defendant's argument that she implicated defendant instead of Chambers because she was afraid of Chambers. In addition, Chambers' and Griffin's previously undisclosed witness statements revealed the reason why Chambers did not initially go to the police after the shooting. Defendant has failed to meet his burden of showing that the previously undisclosed evidence undermined the confidence in the verdict. *Bagley*, 473 US at 682.

C. Defendant could have obtained the recorded witness statements by exercising reasonable diligence.

As set forth in *Lester*, *supra*, defendant was required to show that he did not possess the evidence and could not have obtained it with the exercise of reasonable diligence.⁴⁷ Because defense counsel was told during trial that the recordings existed, he had an obligation to exercise due diligence to obtain those recordings.

Information that the witness statements were recorded was discovered during trial. Detective Wittebort testified during cross-examination that the witness interviews were recorded (137a). When this information was revealed, defense counsel did not ask for a continuance to review the recordings.

“Although a defendant's *Brady* rights are violated if he discovers information after trial which had been known to the prosecution but unknown to the defense,

⁴⁷ Even if the due diligence requirement is not a separate element that a defendant must establish to prove a *Brady* violation, it is nonetheless relevant to the determination whether the evidence was “suppressed” or whether the undisclosed evidence was “material.” See *Strickler*, 527 US at 281-282.

the same is not true,” where, as here, “the evidence is discovered during trial.” *United States v Almendares*, 397 F3d 653, 664 (CA 8, 2005)(quotations and citations omitted). We have previously held that “*Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial.” *Id.* Here, Jeanpierre was given the opportunity to call any additional witnesses based on the content of the reports without objection from the government. He elected not to conduct any further inquiry of any witness based on this material. Thus, due process is satisfied. [*United States v Jeanpierre*, 636 F3d 416, 422 (CA 8, 2011)].⁴⁸

Defense counsel should have requested a continuance when he discovered that the witness statements were recorded. The failure to do so undercuts any claims of prejudice.⁴⁹ See generally MCR 6.201(J)(if a party fails to comply with the discovery rules, which includes

⁴⁸ See also *Commonwealth v Tuma*, 285 Va 629, 634-640; 740 SE2d 14 (2013)(no evidence suppressed under *Brady* because defense counsel discovered recorded statements during trial, and should have asked for a recess to listen to them and then recalled witnesses if necessary); *United States v Kimoto*, 588 F3d 464, 488 (CA 7, 2010)(where a defendant realizes that exculpatory evidence has been withheld, the appropriate course is to seek a continuance); *United States v Mendez*, 514 F3d 1035, 1047 (CA 10, 2008)(during trial an agent testified about field notes, and defense counsel asked to be provided with the notes and for a recess to review them which was granted. No due process violation occurred because the disclosure was not made too late for the defendant to make use of any benefits of the evidence); *State v Lunsford*, 318 SC 241, 244; 456 SE2d 918 (Ct App, 1995), citing 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 19.5, at 545-546 (1984)(“a defendant’s failure to request a continuance when a disclosure of exculpatory evidence is first made at trial ‘is often viewed as automatically negating any claim of actual prejudice’”); *State v Spivey*, 102 NC App 640, 646; 404 SE2d 23 (1991), citing *Gorham v Wainwright*, 588 F2d 178, 180 (CA 5, 1979)(where *Brady* material was discovered for first time at trial, defense counsel’s failure to request a continuance “undercuts the present argument of prejudice”); *Payne v State*, 516 SW2d 675, 677 (Tex Crim App, 1974)(the opportunity to request a continuance once *Brady* material is disclosed at trial adequately protects due process); *Lindley v State*, 635 SW2d 541, 543-544 (Tex Crim App, 1982)(an accused waives any error resulting from the State’s failure to disclose evidence when he fails to request a continuance).

⁴⁹ In a case discussing newly discovered evidence, this Court addressed the requirement that defendants must exercise “reasonable diligence” in producing evidence at trial. In *People v Rao*, 491 Mich 271, 283-285; 815 NW2d 105 (2012), this Court noted that what constitutes reasonable diligence for producing evidence at trial depends on the circumstances of the case.

When the evidence is claimed to be unavailable because a witness cannot be found, reasonable diligence may include requesting a continuance or postponement....The point is that the law affords a defendant procedural avenues to secure and produce evidence and, under *Cress* [*People v Cress*, 468 Mich 678; 664 NW2d 174 (2003)], a defendant must employ these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial... The policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence in order to prevent judicial sandbagging. [*Id.*, citations omitted].

providing exculpatory information to the defense [MCR 6.201(B)(1)], the trial court may grant a continuance).⁵⁰

In addition to the fact that defense counsel gained knowledge that the witness interviews were recorded during trial, there was also testimony presented at the evidentiary hearing that at least defendant's family members were "looking for" the recorded statements at the time of trial.⁵¹ During the evidentiary hearing, defendant's aunt Audrey Rice testified that after Wittebort's testimony, but before the jury verdict, Wittebort offered defense counsel [Keel] a DVD, which she assumed was the DVD of the witness statements (146b). Mrs. Rice said she confronted Keel outside the courtroom after the exchange because he did not take the tape. Rice indicated, "I couldn't understand why Mr. Keel didn't take the tape and I confronted him outside the courtroom because I was furious like -- *how dare you not take the tape after we've been looking for it, the other attorneys*⁵² *have not been able to locate it*" (emphasis added)(148b).

From Rice's own testimony, there was evidence presented that the defense was aware of the recordings. Because knowledge that witness statements were recorded was discovered during trial and/or because a member of defendant's family said they had been looking for the recording, defendant simply has not met his burden of demonstrating that he could not have

⁵⁰ See also *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000)("even if defendant had established an inadvertent discovery violation, a continuance, had one been requested, would have alleviated any harm to defendant's case); *People v Greenfield*, 271 Mich App 442, 456; 722 NW2d 254 (2006)("when determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance... [and] the complaining party must show that the violation caused him or her actual prejudice").

⁵¹ Defendant argues that Rice's testimony should be "taken with a grain of salt." Defendant's argument conflicts with the fact that Rice was called as a witness for the defense, not for the prosecution.

⁵² Defendant was represented by Anthony Chambers until a couple months prior to trial. As indicated, Chambers submitted an affidavit that he did not receive any audio or video recording from any source including Detective Wittebort (160a).

obtained the evidence by exercising reasonable diligence. Alternatively, since defense counsel did not think the recordings were significant enough to even ask for a continuance to review the recordings, this undercuts any claim of prejudice.⁵³

Conclusion

Viewing the previously undisclosed evidence with the evidence set forth at trial mandates a finding that the failure to disclose the evidence did not undermine confidence in the outcome of the case. Judge O'Brien's decision to the contrary was simply wrong. His cursory opinion (188b) did not set forth a sufficient basis for establishing a *Brady* violation necessitating reversal of defendant's convictions. A proper and detailed independent analysis reveals, first, that the information obtained after trial was not favorable to the defense and could have been obtained at least during trial, with reasonable diligence. Second, a reasonable probability does not exist that, armed with recorded witness interviews, the result of the proceedings would have been different. Defendant's trial was fair. In fact, the People would have had a stronger case had the undisclosed evidence been available for trial. There is no information in the recorded witness interviews, individually or collectively, if used by the defense at trial, which would establish a reasonable probability that the result of the trial would have been different. Evidence that is "possibly

⁵³ The People recognize that under the discovery rules, there is a continuing duty to disclose. MCR 6.201(H). However, *Brady* is a constitutional rule, not a discovery rule, and requires less from the prosecution than our discovery rules. In fact, the United States Supreme Court has found that the rule in *Brady* requires less from the prosecution than the ABA Standard for Criminal Justice. *Kyles*, 514 US at 437. See also MRPC 3.8 (a prosecutor in a criminal case shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense").

useful” to the defense does not meet the *Brady* standard. *Bagley*, 514 US at 436. The Michigan Court of Appeals understood this legal concept – Judge O’Brien did not.⁵⁴

⁵⁴ As demonstrated by the fact that Judge O’Brien questioned whether, due to the uncertainty that the new evidence would yield a different result, the proper outcome would be to err on the side of granting a new trial. (187b).

III. DEFENSE COUNSEL'S FAILURE TO ASK FOR A CONTINUANCE TO INVESTIGATE THE MID-TRIAL DISCLOSURE THAT WITNESS STATEMENTS HAD BEEN RECORDED WAS SOUND TRIAL STRATEGY. IN ADDITION, DEFENDANT FAILED TO MEET HIS BURDEN OF DEMONSTRATING A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ALLEGED ERROR, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT BECAUSE THE ACTUAL RECORDINGS WERE MORE FAVORABLE TO THE PROSECUTION THAN TO THE DEFENSE.

STANDARD OF REVIEW:

Because a *Ginther*⁵⁵ hearing was never held, this Court's review is limited to error existing on the record. *People v Fonville*, 291 Mich App 363, 382-383; 804 NW2d 878 (2011).

ANALYSIS:

Both the Michigan and the United States Constitutions provide that a criminal defendant have the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The federal and state rights to counsel are co-extensive. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

The United States Supreme Court has held that to establish a claim of ineffective assistance of counsel, "a defendant must show both deficient performance by counsel and prejudice." *Knowles v Mirzayance*, 556 US 111, 122; 129 S Ct 1411; 173 L Ed 2d 251 (2009), citing *Strickland*, 466 US at 687. In *Harrington v Richter*, 562 US ____; 131 S Ct 770, 787-788; 178 L Ed 2d 624 (2011), the Supreme Court explained this standard:

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." [*Strickland, supra*] 466 US at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

⁵⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland, supra* at 690.

Defendant has not overcome the presumption that trial counsel's failure to request a continuance, when he discovered that witness statements had been recorded, was sound trial strategy. Since no *Ginther* hearing was held, trial counsel has not had the opportunity to explain his reasoning for failing to request a continuance. Trial counsel is a necessary witness at a *Ginther* hearing, *People v Mitchell*, 454 Mich 145, 169; 560 NW2d 600 (1997). Without a hearing, this Court simply cannot find that defendant has met his burden of showing that trial counsel's inaction fell below an objective standard of reasonableness. On this basis alone, defendant's ineffective assistance of counsel claim must fail.

However, even if defendant's claim of ineffective assistance of counsel is ripe for appellate review, defendant still cannot overcome the presumption that failure to request a continuance was sound trial strategy. Defense counsel did not discover until the last prosecution witness testified that witness statements had been recorded, and the two key witnesses, Holloway and Chambers, had testified the day before the discovery. Counsel may have reasonably believed that the disclosure had come too late to be effective.⁵⁶ In addition, defense counsel was well

⁵⁶ See *Mendez, supra* at 1047 (no due process violation occurred because the disclosure was not made too late for the defendant to make use of any benefits of the evidence); *Wilson*, 41 Kan App 2d at

.....*footnote continued on next page*

aware of the fact that defendant's friend and his driver on the night of the murder, Joshua Koch, had written a statement implicating defendant in the charged crime.⁵⁷ Although Koch did not testify at trial, defendant had a copy of Koch's FBI report where he identified defendant as the shooter. Knowing this, counsel could have reasonably believed that Holloway and Chambers' recorded statements would not have been helpful to the defense.

In addition, for the reasons set forth in Issue II, defendant cannot establish the necessary prejudice under *Strickland*. The prejudice prong set forth in *Strickler*, used to determine whether there has been a *Brady* violation warranting a new trial, was derived from the prejudice prong set forth in *Strickland*, used to determine whether defendant was denied the effective assistance of counsel.⁵⁸ If defendant cannot establish that the nondisclosed evidence was material under *Strickler*, he likewise cannot show he was prejudiced pursuant to *Strickland*. Because the undisclosed evidence was more favorable to the prosecution than to the defense, and because defendant was not denied a fair trial based on the nondisclosure, he cannot establish a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Strickland, supra*.

51(evidence is suppressed if the prosecution failed to disclose the evidence before it was too late for the defendant to make use of it).

⁵⁷ Koch told the FBI that defendant shot Harris (196b). Although Koch did not testify at defendant's trial, his statement to the FBI is part of the lower court record because it was attached as an appendix to defendant's motion for new trial.

⁵⁸ See *Zanders v United States*, 999 A2d 149, 162 (DC App, 2010)(the origin of the *Brady* materiality test was derived from the prejudice prong for ineffective assistance of counsel). See also *United States v Rivalta*, 925 F2d 596, 598 (CA 2, 1991), citing *Bagley*, 473 US at 682:

The Supreme Court's formulation of the materiality inquiry [for alleged *Brady* violations] -- whether there is a reasonable probability that the result of the proceeding would have been different -- is derived from a case [*Strickland*, 466 US at 694] in which the Court had explicitly held that the same inquiry in a different context presented a mixed question of law and fact."

Conclusion

Defendant was not denied the effective assistance of counsel for trial counsel's failure to request a continuance when he discovered, mid-trial, that witness statements had been recorded. Defense counsel's actions did not fall below an objective standard of reasonableness because counsel could have reasonably believed that the disclosure had come too late to be effective. In addition, defendant was not prejudiced by counsel's alleged error because the recorded witness statements were more favorable to the prosecution than to the defense.

RELIEF

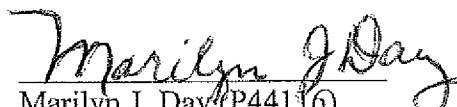
WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Marilyn J. Day, Assistant Prosecuting Attorney, respectfully request that this Honorable Court affirm the Court of Appeals' judgment.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

THOMAS R. GRDEN,
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